IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13011

BERNICE FEITLER and IRWIN FEITLER, Individually and Trading as GARDNER & COMPANY,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Rehearing

PETITION TO REVIEW AN ORDER OF
THE FEDERAL TRADE COMMISSION

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PETITION FOR REHEARING.

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

It seems obvious to the petitioners that the opinion in the instant case is clearly, not only contrary to and in conflict with this Court's holding in the *Lichtenstein* Case but is a complete overruling of all of the following principles of law laid down by the Supreme Court in the following cases; to wit: *F.T.C.* v. *Klesner,* 280 U.S. 19; *F.T.C.* v. *Raladam Co.,* 283 U.S. 643; *F.T.C.* v. *Royal Milling Co.,* 288 U.S. 212; *F.T.C.* v. *Keppel & Bro.,* 291 U.S. 304; *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495; *F.T.C.* v. *Bunte Bros.,* 312 U.S. 349; *Reilly, Postmaster* v. *Pinkus,* 388 U.S. 269; *Jacob Siegel Co.* v. *F.T.C.,* 327 U.S. 608; and *F.T.C.* v. *A. P. W. Paper Co., Inc.,* 328 US. 193.

Let us first discuss briefly each of the above cases and then point out wherein the instant case is in direct conflict with them, particularly showing that the case at bar is not supported by the *Lichtenstein* Case.

The Supreme Court in setting aside the Commission's order in the case of *F.T.C.* v. *Klesner,* 280 U.S. 19, held that to bring a case within the jurisdiction of the Commission the Public interest must be specific and substantial. In this case the Supreme Court set aside the order on the ground that the proceeding therein was not to the interest of the public as required by the F.T.C. Act. This is an announcement of two fundamental, essential and indispensable principles, first the public interest must be specific, and second, it must be substantial.

In the case of *F.T.C.* v. *Raladam Co.,* 283 U.S. 643, there is an enlightening discussion by the Supreme Court concerning the requirement of and what is substantiality required in cases arising under this statute. This will be discussed at length hereinafter.

In the case of *F.T.C.* v. *Royal Milling Co.,* 288 U.S. 212, at page 217, the Court says:

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial."

In the case of *F.T.C.* v. *Keppel & Bro.,* 291 U.S. 304, the Court says:

> "*It is true that the Statute does not authorize regulation which* has no purpose other than that of relieving merchants from troublesome competition or of *censoring the morals of businessmen.*" (Italics supplied.)

The Court in addition laid down the rule that the Commission's authority is limited to the elimination of unfair marketing methods, that the Commission's authority is limited to the restraining of competitive methods and that the Commission has no authority to bar the selling and distributing of a product.

The Supreme Court in the case of *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, held that Congress has no power over intrastate transactions which do not have a direct effect upon interstate commerce.

In the case of *F.T.C.* v. *Bunte Bros.,* 312 U.S. 349, the Supreme Court held that the F.T.C. does not have any jurisdiction over intrastate commerce.

The Supreme Court in the case of *Reilly, Postmaster* v. *Pinkus,* 388 U.S. 269, laid down the principle of law that the Commission has no authority to bar the selling and distributing of a product and also that the Commission's order can only restrain methods of competition, that is, marketing methods and that the order must be so framed that after barring a method of competition the offender must be let free to otherwise sell his product.

In the case of *Jacob Siegel Co.* v. *F.T.C.,* 327 U.S. 608, the rule of law is laid down by the Supreme Court that the Commission's authority and jurisdiction is limited solely to the restraining of the use of marketing methods. In laying down this rule of law, the court in this case cited the case of *F.T.C.* v. *Winsted Hosiery Co.,* 258 U.S. 483, in doing so the court makes it clear that the case at bar is also in conflict with the *Winsted* Case.

In the case of *A.P.W. Paper Co., Inc.,* 328 U.S. 193, there is laid down four principles which we wish to set out, (1) that before the amendment of 1938 the Commis-

sion's authority was confined absolutely to the protection of competitors against unfair methods of competition, (2) that the only public interest before the amendment was the public interest which the public had in eliminating the unfair method of competition, (3) after the amendment the Commission's authority and jurisdiction was enlarged to include the right and authority to protect consumers, therefore, that after the amendment the Commission's authority is limited to either the protection of competitors from unfair methods of competition or consumers from acts which result in purchasers being deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin, (4) that the public interest is exactly the same after the amendment as before the amendment.

In a footnote the court said:

> "In *F.T.C.* v. *Raladam Co.*, 283 U.S. 643, 647, 648, the Court had ruled that, 'The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance'. The 1938 Amendment to Sec. 5 of the F.T.C. Act was designed to make 'the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor'."

Before taking up the above principles and the *Lichtenstein* Case, it is important to have a clear and concise understanding of the facts which the petitioners wished to establish by their proferred but rejected evidence. The

first of these facts, and one of which is of vital importance to the resolving of this case, is that there are two separate and distinct fields in the distribution of merchandise by chance, (1) the field of merchandising by gambling, (2) gambling for merchandise. There is a marked and substantial difference between the field of merchandising by gambling and the field of gambling for merchandise. The petitioners are the first to attempt to show by evidence or otherwise and rely upon this difference. This difference in the two fields of activity is of such a magnitude that what may be true as to one of them is not true as to the other. To illustrate the so-called "break and take" or "draw deals", the type involved in the *Keppel* Case, are typical of the cases wherein a piece of candy is sold and in addition to the candy purchased the purchaser receives a chance to win a prize, that is, in all cases wherein there is a sale of a commodity, and in addition to receiving the commodity the buyer thereof is also given a chance to win an additional prize. In such cases it is merchandising by gambling. On the other hand, in cases wherein the gambling is for merchandise as distinguished from merchandising by gambling, there is no sale of a product or commodity, the entire transaction is simply that an amount of money is given for a chance, if the player is lucky he wins a prize, if he is unlucky he does not receive anything at all for his money. One of the important elements of this difference is that the volume of merchandise sold in the field of merchandising by gambling is entirely different and cannot be attributed to the field of gambling for merchandise. When this volume is eliminated, that is, not taken into account as a volume in the field of gambling for merchandise, the amount of merchandise involved in the field of gambling for merchandise is not substantial enough to give the commission jurisdiction over this field of activity.

The point we are making here is that the petitioners claim the right to show by evidence that within the field of gambling for merchandise there is no specific public interest and the volume of this field is not sufficient to meet the requirements of substantiality required by the Supreme Court cases to give the commission jurisdiction. The evidence would show that this whole field of activity is negligible. This being true, the Commission's refusal to allow the petitioners to introduce their evidence deprived them of a fair hearing which is a violation of their right to due process of law.

This brings us to a discussion of the difference between the case at Bar and the *Lichtenstein* Case. Let us first take up the *Lichtenstein* Case. As this case followed the *Brewer* Case, in order to determine the holding in the *Lichtenstein* Case we must refer to the *Brewer* Case. The crux and limitation of these two cases is set out unequivocally in the following quotation from the *Brewer* Case:

> "For the reasons hereinafter appearing, we have reached the conclusion that, in thus aiding and abetting, inducing and procuring manufacturing and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Commission as vested by the Federal Trade Commission Act. (52 Stat. 111.)"

From this quotation it is self-evident that the only theory involved in the *Lichtenstein* Case is that one who aids, abets, induces or procures another to use unfair methods of competition or unfair acts or practices is himself within the purview of the F.T.C. Act. Under this

theory it becomes an essential issue whether or not the people who use punch boards use an unfair method of competition or an unfair act or practice. Under all of the cases this issue can only be determined by introducing evidence which will establish the facts set out by the Court in the *Brewer* Case, that is to wit: quoting from the *Brewer* Case:

> "The final finding of the Federal Trade Commission stated: 'The practice of respondents (petitioners here) in selling and distributing their lottery devices thus serves to place in the hands of others means and instrumentalities whereby they are enabled to use unfair methods of competition and thereby unfairly to divert substantial trade to themselves from those who do not use such methods.'"

The petitioners' evidence would establish beyond controversy that the use of the punch boards to distribute merchandise does not divert any trade, therefore, it certainly does not divert a substantial amount of trade. That is to say, that the Commission could not in the face of the petitioners' evidence, make such a finding, if it did so, under such circumstances a Court would without hesitation set aside said finding on the grounds that it was not only not supported by the evidence but was clearly in conflict with it. In a case wherein there is not such a finding, that is to say in the absence of such a finding, the *Brewer* and *Lichtenstein* Cases have no application. From this it is self-evident that the *Brewer* and *Lichtenstein* Cases are absolute authority for petitioners' proposition that they are entitled to introduce their evidence and that the denial of such a right is a violation of their constitutional right to due process of law.

Now as to the applicability of the principles of law herein above set out, the *Brewer* and *Lichtenstein* Cases

go on the theory as we have said before, that the use of the punch board is an unfair method of competition and an unfair act or practice within the intent and meaning of the F.T.C. Act. In other words, all the above principles are taken into consideration in determining the conduct of the users of the board. Then the cases go one step further than any case heretofore and say that Congress intended that in addition to having power to restrain the use of unfair methods of competition or unfair acts and practices, the Commission has power to stop anyone aiding, abetting, inducing, procuring others to use such methods. Beyond this the *Lichenstein* and *Brewer* Cases do not go.

The case at bar does not follow the above theory but is an entirely different theory having no similarity whatsoever to the theory of the *Lichtenstein* and *Brewer* Cases. This case is based solely upon the theory that the Commission is given authority over acts which encourage the public to gamble. This clearly amounts to the censoring of morals, as we have shown above, the Supreme Court has held definitely that the Commission has no jurisdiction whatsoever on the basis of public morals.

It seems to the petitioners that there is no solid foundation upon which to predicate the Commission's jurisdiction to stop the interstate shipments of a device which is to be used to distribute merchandise by chance when the basis of such holding is the use of such device encourages the public to gamble, that is, if the basis of the jurisdiction, the encouraging of the public to gamble, then the jurisdiction of the Commission should extend to the elimination of all devices which will be used to encourage the public to gamble, but in the instant case the Court holds definnitely that the Commission does not have jurisdiction over

gambling devices as such, that is to say, it does not seem logical to the petitioners to say the Congress intended to give the Commission such a limited jurisdiction over the encouraging of gambling. It seems that the only logical interpretation of the grant of power would be that the Commission either has full power to stop the shipment of devices which will encourage gambling by the public, or that it has absolutely no power upon this basis. In other words it seems to the petitioners that it is inconsistent to hold that:

> "We agree that the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices,"

and having held as above to then lay down the principle of law that

> "It is the fact that the interstate shipment by these devices facilitates a kind of merchandising which induces and encourages the public to gamble, which makes such shipment an 'unfair trade practice.'"

As to the question of the public interest, the Supreme Court in the *Raladam* Case has the following to say:

> "By these additional words, protection to the public interest is made of paramount importance but, neverless, they are not substantive words of protection, but complimentary words of limitation beyond the jurisdiction conferred by the language immediately preceding."

and this Court in the *Lichtenstein* Case on the question of public interest said:

> "Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention. The language of the Supreme Court in *Phalen* v. *Virginia,* 49 U.S. 163

(1850), as to the "pestilence" of lotteries which "enters every dwelling * * * reaches every class * * * and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise."

Petitioners contend that this is the only basis upon which the requirement of public interest is satisfied in the *Lichtenstein* Case. This being true, the public interest rests upon a fact which petitioners contend they have the right to introduce evidence, in other words the petitioners' evidence would certainly establish that what is said in the *Lichtenstein* Case about the use of punch boards making inroads into line after line of merchandise has no foundation whatsoever in fact. This being true, there is no basis upon which to predicate the requirement that this proceeding is in the interest of the public. Because we have shown above that the law is well settled by the Supreme Court, that the only public interest which will sustain the Commission's jurisdiction is the interest the public has in the elimination of either a practice which is unfair to competition or consumers. The fact that maybe the elimination of either the practice or act would be beneficial to the public morals, health or otherwise, other than the two situations mentioned above, does not satisfy the requirements of public interest.

For the above foregoing reasons, the petitioners respectfully request the Court to grant this their petition for a rehearing.

Respectfully submitted,

F. W. James,
Attorney for Petitioners.

Certificate.

Comes now the undersigned attorney for petitioners herein and hereby certifies that in his judgment this Petition is well founded and is not interposed for delay.

F. W. James
Attorney for Petitioners